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No. 150

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

DOUGLAS MCCRARY, et al.

v.

ALADDIN RADIO INDUSTRIES, INC.

and

ALADDIN INDUSTRIES, INC.

On Petition for a Writ of Certiorari to the Court of Appeals of Tennessee, Middle Section, at Nashville

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The "questions presented" as framed in the petition for certiorari are not, except in minor part, questions actually presented on the record. There was no mandatory injunction to compel truck drivers to cross

a picket line. No injunction was sought or obtained against any labor union or any member thereof, and there was no allegation of collective activity, concerted action, or unfair labor practice. The bill seeking the injunction raised no issue under Section 7 or Section 8(b)(4), or any other provision of the National Labor Relations Act, as amended.[1]

The question actually presented is whether employees of common carrier truck lines may, with impunity, violate a temporary injunction issued by a state court requiring the carriers, "their officers, agents, employees . . . and or confederates," to render customary service to a manufacturing plant, at which a strike is being conducted. The injunction did not compel them to remain at work. So long as they remained at work, however, it was their duty, under the temporary injunction, as employees of the common carrier, to pick up and deliver freight at the manufacturing plant in question without discrimination. The question is whether or not the injunction was void.

The question may be divided as follows:

(1) *On the assumption* that, when a hearing eventually takes place,[2] the temporary injunction should be dissolved, and a permanent injunction refused on the ground that the National Labor Relations Act has preempted the field of common carrier law with respect to service to plants at which there may be a picket line, does it follow that the state court is powerless to punish

[1] 49 Stat. 452 (1935) as amended; 29 U. S. C., sections 151 et seq.

[2] The injunction suits have remained in *statu quo*, by agreement, pending the disposition of the contempt proceedings. While there are two suits, and two injunctions, the singular phraseology is used in the brief for the sake of simplicity.

a violation of the injunction while it remains in effect? And in giving a negative answer to this question, did the Tennessee Court of Appeals depart from settled Tennessee procedure so as to deprive petitioners of their rights under the Fourteenth Amendment?

(2) Is the assumption on which the former question was predicated a valid one,— that is to say, has the National Labor Relations Act actually pre-empted the field of common carrier law to that extent?

It is believed that the pre-emption question will not be reached by the Court in this case because no matter how that question should be decided, the temporary injunction was not void and, under Tennessee law, it could not be violated with impunity. If this is an adequate non-federal ground for the decision, the pre-emption issue becomes irrelevant.

STATEMENT

By order entered at the October term, 1957, in No. 116 (355 U. S. 8), a former petition for certiorari in these cases was granted and the cases remanded "for consideration in light of *Teamsters, C. H. & T. D.* v. *Kerrigan Iron Works, Inc.*, 353 U. S. 968." The remand was doubtless to enable the Tennessee Court of Appeals to clarify the basis for its decision, as in *Minnesota* v. *National Tea Co.*, 309 U. S. 551. This consideration in the light of the *Kerrigan* case has taken place and the Tennessee Court of Appeals has held that the *Kerrigan* case is distinguishable on two grounds and is inapplicable.[3] In *Kerrigan* the validity

[3] The opinion on remand is copied in Appendix A to the petition (Pet. 21-35) and correctly sets forth the facts. The petition repeats inaccuracies in the earlier petition, to which attention was called in the "Memorandum for Respondents" in answer thereto, No. 976, October Term 1956.

of an injunction against a labor union was involved, based in part on allegations of unfair labor practice. In the instant case there was no injunction against a labor union and there were no allegations of unfair labor practice. In *Kerrigan* the validity of a permanent injunction was directly involved. In the instant case the validity of the injunction, which was a temporary injunction, is not directly involved, but only collaterally. The issue here is the validity of judgments for contempt imposed separately upon some eighteen truck drivers and upon a local labor union and its president for conduct designed to prevent compliance with the temporary injunction. The decision of this issue depends upon whether the temporary injunction was void, as petitioners claim, or valid (or at most merely voidable, and proof against collateral attack) as respondents claim. The solution of that question turns mainly on Tennessee equity law.

The opinion of the Court of Appeals filed August 6, 1958 holds that the Chancellor had jurisdiction to grant a temporary injunction, based on the allegations of the bill before him (which raised no issue of collective activity, concerted action or unfair labor practice), and to punish for violation, irrespective of whether or not the Chancellor might later hold, on a further hearing, that the National Labor Relations Act had pre-empted the field of common carrier law as respects service to plants at which there are picket lines. The Court of Appeals further held that the subject matter of the suit was not pre-empted by the federal act and was within the jurisdiction of the Tennessee Chancery Court. For both reasons the Court held that the *Kerrigan* case was inapplicable, and re-affirmed the judgments holding the petitioners in contempt.

The petitioners on August 16, 1958 filed a petition to rehear, contending that the Court of Appeals had ignored prior Tennessee law to the effect that an injunction is void if the court issuing the injunction is without "jurisdiction." The Court of Appeals denied the petition to rehear,[4] stating that under Tennessee law the Chancellor "had jurisdiction to determine the issues, including that of his own jurisdiction, and to grant the temporary injunction to preserve the *status quo* pending such determinations, and to punish defiance of it as contempt." (Pet. 43).

ARGUMENT

1. The Chancery Court Had Power to Punish the Violation of Its Injunction Irrespective of How the Pre-Emption Question Should Be Decided; and the Decision to This Effect is in Accord With Prior Tennessee Decisions.

The Court of Appeals was correct in holding that the Chancellor had jurisdiction to issue the temporary injunction and to punish its violation irrespective of the pre-emption question. Petitioners' argument illustrates the common fallacy of equivocation or the "ambiguous middle." Because orders are void where entered by a court without "jurisdiction," in *one* sense of the word, the argument is that orders entered by a court without "jurisdiction," in *any* senses of the word, are likewise void.

"Jurisdiction" is derived from "juris" and "dico"—"I speak by the law." "Lack of jurisdiction" is frequently said to consist either (1) in the court's total want of power to act at all, or (2) lack of power to act in a particular case because of the absence of conditions essential to exercising jurisdiction.

[4] The opinion is copied in Appendix B to the petition. (Pet. 36-44).

Forbearance by a court from exercising its powers to the fullest possible extent may also be called "lack of jurisdiction," as pointed out by Circuit Judge L. Hand in *Amey* v. *Colebrook Guaranty Savings Bank*, (C. C. A. 2, 1937) 92 F. 2d 62. Whether or not a court has "jurisdiction" in a particular case may depend upon the decision of intricate, novel, and disputed questions of law and fact. An illustration is the jurisdiction of the United States district courts in diversity cases. See *American Federation of Musicians* v. *Stein*, (C. C. A. 6, 1954) 213 F. 2d 679, where the Court of Appeals held that a District Court, sitting in Tennessee, had jurisdiction to issue a temporary injunction to preserve the *status quo* while determining whether or not diversity of citizenship existed,—a question which could be determined only after the taking of evidence. Similarly, in *United States* v. *Mine Workers of America*, 330 U. S. 258, the question of jurisdiction depended upon the construction of the Norris-LaGuardia Act. The Court held that even if the Act were applicable; the District Court "had the power to issue a restraining order for the purpose of preserving existing conditions pending a decision upon its own jurisdiction." Having such power, the District Court also had the power to punish disobedience of its order.

In *United States* v. *Mine Workers*, the Court indicated that a different result would follow "were the question of jurisdiction frivolous and not substantial." (p. 293). It cannot be successfully contended in the instant case that the lack of jurisdiction of the Chancery Court was so well settled that any contention to the contrary was frivolous and not substantial. At the time the injunction was issued, the *Kerrigan* case had not been decided. The *per curiam* decision in *General Drivers* v. *American Tobacco Co.*, 348 U. S.

978, was rendered after the temporary injunction was issued, and upon being brought to the attention of the Chancellor, he went so far as to suspend the injunction until he was able to satisfy himself whether this decision deprived his court of jurisdiction. All petitions for contempt which had reference to conduct during the period the injunction was suspended were dismissed. Upon full consideration of *General Drivers* v. *American Tobacco Co.*, the Chancellor was of the opinion that it did not deprive him of jurisdiction, and he announced that in the future the injunctions would be strictly enforced. (Record, p. 108).

This is apparently the first case to come before this Court in which the contention is made that the National Labor Relations Act has deprived a state court of jurisdiction even though no labor union is a party and no unfair labor practice is alleged. In *United States* v. *Mine Workers*, the Court stressed the point that the applicability of the Norris-LaGuardia Act in such a case "had not previously received judicial consideration." Hence the problem was a substantial one. The present problem is equally novel. The Court has expressly recognized "the inadmissibility of the assumption that ascertainment of pre-emption under the Taft-Hartley Act is self-determining or even easy." *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511, 516.

A temporary injunction under Tennessee law, as well as under general law, "without determining any question of right," merely "preserves matters in *statu quo*." (Gibson's Suits in Chancery, 5th ed. section 848). Since it is well settled general law that a court has jurisdiction in a doubtful case to determine its own jurisdiction and to preserve the *status quo* pending further hearing, the petitioners in the instant case have

found it necessary to contend that, prior to the decision in the instant case, Tennessee law on this subject was peculiar and different, and that a new rule has been adopted in mid-stream, bringing the case within the ambit of *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449. This contention was rejected as unfounded by the Court of Appeals in its opinion denying the petition to rehear. When general language cited by petitioners from opinions in former Tennessee cases is considered in the light of the facts in those cases, there is no conflict or inconsistency, as the Court of Appeals carefully explained. As said by Chief Justice Marshall in *Cohens* v. *Virginia*, 6 Wheat. 264, 399, "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used."

In *Weidner* v. *Friedman*, 126 Tenn. 677, cited by the Court of Appeals, but ignored in the petition, the Chancery Court was held to have been "without jurisdiction" to enjoin the operation of "disorderly houses" at the suit of a private person, where there was no allegation of special and peculiar injury to the complainant, different in kind from that suffered by the general public. The Supreme Court of Tennessee held that the abatement of such a nuisance was for the Criminal Court, not the Chancery Court, and accordingly reversed the decree of the Chancellor on the merits for lack of jurisdiction, but at the same time sustained judgments for contempt.

The authority cited by the petitioners, Gibson's Suits in Chancery, 5th Ed. section 454, classifies void judgments and decrees as being those "that appear on the face of the record itself to have been rendered without jurisdiction of the parties or of the subject matter.

. . ." (Pet. 16). In the instant case the injunction was valid on its face, and in the language of the author, even if it was voidable it was "proof against collateral attack." (Pet. 16) In Footnote 58 (not quoted in the petition), the author cautions that while voidable judgments are sometimes miscalled "void," they are "valid until reversed by direct attack."

It has been recognized by this Court in cases involving the pre-emption doctrine that the jurisdiction of the state court must be determined from the pleadings. *Garner* v. *Teamsters Union*, 346 U. S. 485, 501; *Weber* v. *Anheuser-Busch, Inc.*, 348 U. S. 468, 481. There has been in the instant case no departure from settled principles. Petitioners are without basis for their contention that under Tennessee law, prior to the instant decision, an order of the Court was necessarily void if it were later held that the Court was without jurisdiction, although such lack of jurisdiction did not appear on the face of the record. If an injunction is void, it may be violated with impunity. But petitioners are in error in their assertion that it has ever been the law in Tennessee that a temporary injunction is necessarily void whenever the Court which issued it lacked "jurisdiction" in *any* sense of that word. Petitioners are in the peculiar position of arguing that the *Tennessee appellate courts* have not correctly decided a question of *Tennessee law*.

The decision of the Tennessee Court of Appeals rests solidly on the adequate non-federal ground that a temporary injunction which is not void must be obeyed while it is in force, and that under Tennessee law (as well as under federal law) this injunction was not void. Accordingly the petition for certiorari should be denied without the necessity of considering the question of pre-emption. *Fox Film Corp.* v. *Muller*, 296 U.S. 207.

2. The National Labor Relations Act Did Not Pre-Empt the Field so as to Deprive the Chancery Court of Jurisdiction to Enforce the State Law of Common Carriers.

The pre-emption question may be stated as follows: What should the decision of the Chancery Court be if, on final hearing, the petitioners herein, having intervened or asked leave to intervene as defendants, should move for a dismissal of the complaint on the ground that the Chancery Court has no jurisdiction to *entertain* the application for a permanent injunction?[5] If the answer to the question is pertinent to the decision of the case now before this Court, it is submitted that the hypothetical motion to dismiss the complaint on this ground should be denied.

Petitioners seem to argue, in effect, that the common carrier defendants in the Chancery Court proceeding are at liberty, through the device of employing truck drivers who are members of a labor union, and of agreeing with the labor union that the truck drivers need not cross picket lines, to nullify the state law applicable to common carriers, which requires non-discriminatory service. It is submitted that the National Labor Relations Act does not so provide and should not be so construed. But a decision on that issue would be within the jurisdictional competence of the Chancery Court, if the question were properly raised. It would not be incumbent on that Court to dismiss the case for want of jurisdiction merely because the question is raised. The Tennessee Chancery Court has jurisdiction to construe federal as well as

[5] Whether the permanent injunction should issue, and if so, how it should be framed so as to protect privileges of employees, are questions which do not arise here. Until a permanent injunction is issued, or the bill dismissed, there will be no final judgment to be reviewed.

state law, and to resolve conflicts between them. *Robb v. Connolly*, 111 U. S. 624, 637; *U. S. v. Bank of New York*, 296 U. S. 463, 479.

Petitioners' argument runs, however, that although, in general, a state court has jurisdiction to decide matters of federal law, this is not true with respect to the National Labor Relations Act. The argument seems to run that, on the final hearing of the case, facts and circumstances might conceivably be proved which would be relevant if an issue under Section 7 or Section 8 of the Act were present. The argument implies that even though the pleadings now contain no allegations of such facts or circumstances, the possibility of later amendment is sufficient to deprive the court of jurisdiction under recent decisions of this Court.

One complete answer to the argument is that given by the Court of Appeals (Pet. 30) where, after pointing out that the petitioners stated, both in their answers and on the witness stand, that the truck drivers had acted individually and not in concert, it is said:

> "Since the acts of each of the individual appellants in defiance of the temporary injunction were separate and individual acts, and not 'concerted activity', we understand they could not be a 'concerted activity' within the protection of sec. 7 of the federal Act. *N. L. R. B. v. Illinois Bell Tel. Co.* (7 C. C. A.), 189 Fed. 2d 124, 127-129. Nor could such acts of these individuals, unconnected with any union, be a union unfair labor practice under sec. 8(b)(4) of that Act, which by its terms applies only to a 'labor organization or its agents'."

But even if the petitioners were free as intervenors to assert that they engaged in concerted action, and to

invoke the protection of Section 7, the Chancery Court would not be deprived of jurisdiction. The case involves the duties of common carriers, and the possibility that an overlap from the field of labor law might occur at a later stage would not deprive the court of jurisdiction to render a decision. This becomes clear when consideration is given to the bases on which Taft-Hartley pre-emption rests. There are two such bases, each separate and distinct from the other:

(1) In the field of substantive law, Congress has pre-empted certain areas of regulation with respect to labor-management relations, thereby excluding the enforcement of state laws in the same areas. *Automobile Workers* v. *O'Brien*, 339 U. S. 454; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383; *Hill* v. *Florida*, 325 U. S. 538; *Weber* v. *Anheuser-Busch, Inc., supra*, and cases there cited.

(2) Congress has also provided the exclusive remedies for the enforcement by the aggrieved party of the rights created by the Act. *Garner* v. *Teamsters Union*, 346 U. S. 485. Even if the Board refuses jurisdiction, an "inescapable implication of exclusiveness," is found in the proviso to Section 10(a), added to the Act in 1947, whereby the Board is authorized to cede jurisdiction over the prevention of an unfair labor practice to a state agency under certain conditions. *Guss* v. *Utah Labor Board*, 353 U. S. 1, 10. It follows that a state agency cannot obtain jurisdiction over the prevention of an unfair labor practice affecting interstate commerce except by cession of jurisdiction, and cannot award damages on account of an unfair labor practice. *San Diego Building Trades Council* v. *Garmon*, 359 U. S. 236.

In the instant case we are concerned only with the question of remedy. Neither in the proviso of Section 10(a) nor in any other provision of the Act is there a remedy provided against discrimination by common carriers. Hence the argument that statutory remedies are exclusive is beside the point. Although petitioners cite and rely upon *San Diego Building Trades Council v. Garmon, supra*, the decision does not support their argument. There the California substantive law was inapplicable because interstate commerce was affected, and because the federal Act had pre-empted the field. But this fact alone did not oust the California court of jurisdiction to decide whether an unfair labor practice under federal law had been committed. Jurisdiction of the state court was found to have been withdrawn, not because Congress had pre-empted the field of unfair labor practices affecting interstate commerce, but because the federal Act had also expressly provided the remedy to be pursued by the aggrieved party.

The applicable principle was stated and applied in *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U.S. 481, where it was contended that a state court had no jurisdiction to enforce a right of action arising under the Carmack Amendment to the Interstate Commerce Act. In denying this contention, the Court said (p. 490):

> "... Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the state Government, there is no presumption that Congress intended to prevent state courts from exercising the general jurisdiction already pos-

sessed by them, and under which they had the power to hear and determine causes of action created by Federal statute. *Robb* v. *Connolly*, 111 U. S. 624, 637."

In the instant case the respondents are not seeking to enforce a right created by federal statute. They seek merely to enforce the general law respecting the duties of common carriers. Apparently recognizing the weakness of their position, the petitioners, in their former petition for certiorari, asserted as one of the questions involved (and in this petition they say that it is still involved, although no supporting argument is presented) that the Interstate Commerce Act[6] had pre-empted the field so as to deprive the Chancery Court of jurisdiction. But Section 22 of that Act expressly disclaims an intent in any way to "abridge or alter the remedies now existing at common law or by statute." Congress having been thus at pains to remove any question as to the jurisdiction of state courts to enforce the duties of common carriers, it would be an anomaly indeed if it intended to deprive them of that same jurisdiction through the enactment of legislation dealing not with carriers but with an entirely different subject matter.

Petitioners assert (Pet. 13, Footnote 17) that the decision below is contrary to *United Mine Workers'* v. *Arkansas Oak Flooring Co.*, 351 U. S. 62, 75. In that case a union, which had not filed the data or affidavits required by Section 9 of the Act, picketed the premises of the employer to obtain recognition, and the employer obtained an injunction in the state court, not on the theory of unfair labor practice, but on the theory that recognition of a non-complying

[6] 24 Stat. 379 (1887) as amended; 49 U. S. C., section 1, et seq.

union "would be illegal and that picketing to secure it, therefore, was subject to restraint by a state court." (351 U. S. 68). The decision of the Supreme Court of Louisiana sustaining a permanent injunction was reversed by this Court on the ground that, as a matter of substantive law, the state court should have sustained the union's defense that, under Section 7 of the Act, the picketing was a protected activity. This Court assumed without question that the state court had jurisdiction to decide the case on its merits.

In each of the other cases relied upon by petitioners, the moving party alleged an unfair labor practice. On the other hand, in *International Assn. of Machinists* v. *Gonzales*, 356 U. S. 617, the gravamen of the action was the illegal expulsion of the plaintiff from membership in a union in violation of his rights under the union constitution and by-laws. No charge of unfair labor practice appeared in the petition by which the state court's jurisdiction was invoked. The Court held that the power of the state court to order reinstatement in the union and to award damages for breach of contract was not precluded by the fact that the union's conduct might also involve an unfair labor practice.[7] In the *San Diego* case the Court referred to *Gonzales* as involving the power of a state to regulate "where the activity regulated was a merely peripheral concern of the Labor Management Relations Act."

[7] The Court pointed out that although "the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering." (356 U.S. 621). Cf. *Shriver* v. *Woodbine Savings Bank*, 285 U. S. 467, holding that the inadequacy of a statutory remedy is itself persuasive that it was not intended to be exclusive, where the statute does not state that it is exclusive. Neither this case nor *Galveston H. & S. A. Ry. Co.* v. *Wallace*, *supra*, has been cited by the Court in any of the Taft-Hartley pre-emption decisions.

The same characterization is fitting here. The duties of common carriers are, at most, a peripheral concern of that Act.

In *United Automobile Workers* v. *Russell*, 356 U. S. 634, this Court upheld the power of an Alabama court to award damages to a non-union employee for malicious interference by the union with his lawful occupation by preventing him from entering the plant where he was employed, notwithstanding the fact that the plaintiff alleged violation of Section 8(b)(1)(A) of the federal Act. In the *San Diego* case this decision was explained on the basis that "the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."

In this country there is no more deeply rooted interest than access to common carriage. To repeat what was said in our reply to the former petition for certiorari in this case: "In an economy established upon the land, access to the highway came to be a right of first importance. If a man owned a tract of real property completely surrounded by holdings of others, the common law gave his an easement which secured to him access to and egress from his own property. In an economy based upon commerce, a person, natural or corporate, must have access to common carriage if he is to carry on. From the days when the term first entered the language it has been a principle of the law that common carriage shall be available to all, free from discrimination in service and in charges . . ."

Except for such general expressions as "the exclusive primary competence of the Board," there is

nothing in the *San Diego* opinion which gives the slightest support to the theory of petitioners that a state court, which has rightfully assumed jurisdiction, on the basis of the original pleadings, of a case involving solely the duties of common corriers, must refuse to proceed with the case for lack of jurisdiction if and when a question of labor law is subsequently injected, or because of the possibility that such a question might be injected. There is no "compelling congressional direction" for such an extension of implied federal pre-emption,—a branch of the law in which, perhaps more than in any other, a frequent recurrence to fundamental principles is essential. If expressions "beyond the point involved" in the opinion in one case were now to be used as stepping stones to the decision of another (the approach of the present petition for certiorari), a "doctrinaire and perverse application of the supremacy clause," to use the language of a distinguished scholar in the field,[9] might eventually result.

CONCLUSION

The earlier petition for certiorari in this case was granted because of surface similarities between this case and the *Kerrigan* case. The carefully reasoned opinion of Judge Felts, speaking for the Tennessee Court of Appeals on the remand, has pointed out that there are also essential differences. His opinion in

[8] *Humphrey's Executor* v. *U. S.*, 295 U. S. 602, 626.

[9] Bernard D. Meltzer, "The Supreme Court, Congress and State Jurisdiction over Labor Relations," 59 Col. L. Rev. 6, 24. The article points out (pp. 16-25) the inappropriateness of a concept of "primary jurisdiction" in the labor-management area. Such a concept would be impossible to apply in a case such as the present one, where the procedure of *Capital Service, Inc.* v. *Labor Board*, 347 U.S. 501, could not be followed for lack of statutory authority.

response to the petition to rehear has clearly demonstrated that under Tennessee law, as well as under federal law, a temporary injunction may or may not be void where the Court had no "jurisdiction" over the subject matter of the case, depending upon the pleadings and circumstances of the case and upon the sense in which "jurisdiction" is used. The Court has held that the temporary injunction in this case was not void, and could not be violated with impunity, irrespective of whether or not the Court correctly applied the preemption doctrine. The Court has given its reasons why the National Labor Relations Act leaves the Tennessee courts free to decide the main case on its merits, after disposing of the ancillary proceedings here involved. It is submitted that these opinions correctly state the law, and that the petition for certiorari should be denied.

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